

NALCC aptly illustrate the continuing trend toward relaxation of reviewability standards. The explanation of the development lies primarily, as suggested above, in the courts' attributing greater importance to the plaintiff's condition than to the independence of administrative processes. This policy choice is typically implemented by greater emphasis upon the judicial concept of ripeness, with its focus upon the aggrieved party's condition, at the expense of the concept of formality and finality as used in the APA. The danger lurking in these developments is that dogmatic reliance upon ripeness as the determinative touchstone of reviewability may result in undue disruptions of the administrative process.

B. PARTIAL REPEAL OF THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

The doctrine of exhaustion of administrative remedies, described by the Supreme Court as a "long settled rule,"¹ occupies a prominent position in administrative law.² Yet, in *United States v. Consolidated Mines & Smelting Co.*,³ the Court of Appeals for the Ninth Circuit, by recognizing a heretofore ignored sentence of section 10(c) of the Administrative Procedure Act,⁴ has caused a significant diminution in the scope of the doctrine's application. In four separate decisions⁵ the Bureau of Land Management, an agency within the Department of Interior, had decided that several mining claims held by Consolidated Mines & Smelting Co. (CMS) were null and void. After CMS ceased to pursue its claims before the administrative tribunals, the agency filed this action to quiet title to the land in question. The district court originally granted the agency summary judgment on the

1. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938).

2. See generally 3 DAVIS § 20; JAFFE 424-58.

3. ____ F.2d ____ (9th Cir. 1971).

4. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. 5 U.S.C. § 704 (1970).

5. ____ F.2d at ____ Six agency decisions were at issue in this case. Because CMS had exhausted the available administrative remedies in the first two decisions, the court simply made a determination on the merits, sustaining the agency's position. See *id.* at ____ Only the remaining four decisions are discussed in this note.

ground that CMS had failed to exhaust available administrative remedies;⁶ however, on a motion for reconsideration, the district court vacated the summary judgment and held that section 10(c) of the APA made the decision judicially reviewable despite the exhaustion doctrine. In a hearing on the merits, the district court sustained three of the agency decisions but reversed the fourth on the ground that the Bureau had improperly denied CMS an adjudicatory hearing. The Court of Appeals for the Ninth Circuit affirmed as to the first three decisions, adopting the district court opinion; however, the lower court's holding on the fourth decision was reversed, thus sustaining the agency's position.

The enactment of the APA in 1946 expressed the desire of Congress to simplify and standardize the unsettled state of federal administrative procedure.⁷ A long established rule of that procedure was the doctrine of exhaustion of administrative remedies⁸—a doctrine developed by the judiciary early in this century⁹ as a matter of comity¹⁰ and to insure the orderly and efficient administration of justice.¹¹ Since the passage of the APA, the courts have continued to apply the doctrine in light of its judicial genesis, without perceiving any congressional intent to limit the doctrine.¹² The third and final sentence of section 10(c) of the APA, however, expressly abrogates the doctrine in certain

6. *Id.* at ____ The opinion does not state the reason that CMS failed to exhaust its remedies; nothing, however, indicates any excusable failure which may have justified review without this novel construction of section 10(c). See *Donato v. United States*, 302 F.2d 468, 470 (9th Cir. 1962).

7. See Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, in *FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 15 (G. Warren ed. 1947); S. Doc. No. 248 at 187.

8. See, e.g., *McKart v. United States*, 395 U.S. 185, 193 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Davis v. Nelson*, 329 F.2d 840, 847 (9th Cir. 1964); *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952). See also 3 DAVIS § 20; JAFFE 424-50.

9. E.g., Comment, *Exhaustion of Administrative Remedies as a Prerequisite to Judicial Review—Discretionary Treatment by Federal Courts*, 44 MICH. L. REV. 1035, 1036 (1946). See generally *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908); *United States v. Sing Tuck*, 194 U.S. 161 (1904).

10. See JAFFE 426; Comment, *Exhaustion of Administrative Remedies*, 39 CORNELL L.Q. 273, 292-93 (1954); cf. *Railroad and Warehouse Comm'n v. Duluth St. Ry. Co.*, 273 U.S. 625, 628 (1927); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 203 (1924); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 229 (1908).

11. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 232 (1908); 37 U. CIN. L. REV. 856, 862-63 (1968).

12. 3 DAVIS § 20.08, at 101; cf. *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499-500 (1955).

circumstances. Unless otherwise required by statute, agency action which is immediately operative¹³ on the private party will be considered final for the purpose of judicial review. A private party can be forced to exhaust his administrative remedies only if he is required to do so by statute or if the agency rules both require him to exhaust the agency appeals *and* make the original decision inoperative pending such appeals.¹⁴ Although this statutory language appears to significantly alter the exhaustion doctrine, government reports¹⁵ and contemporary commentaries¹⁶ concerning the APA are replete with statements that the provisions of section 10(c) "involve no departure from the usual and well-understood rules of procedure in this field."¹⁷ The legislative history,¹⁸ however, makes it clear that Congress intended a different import for section 10(c).¹⁹ Explanatory statements in the

13. The term operative is thought to refer to only that agency action which disturbs the status quo; thus many unilateral agency decisions, such as denials of a claim or license, would require exhaustion of administrative remedies. DAVIS § 20, at 105-06; DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 105 (1947).

14. 5 U.S.C. § 704 (1970). See note 4 *supra*.

Neither the opinion, the statutory language, nor the legislative history deals directly with the question of whether a court may deny review, despite the presence of an operative action, if denial were clearly the more equitable choice. The failure of both the district and the circuit courts to make any effort to weigh the equities indicates that section 10(c) was read as mandatory; furthermore, it can be argued that Congress, by the insertion of the clauses "[e]xcept as otherwise expressly required by statute," *id.* (emphasis added), and "unless the agency otherwise requires," *id.*, has reserved to itself and the agencies the power to decide whether, in view of a particular agency's area of authority, exhaustion should be mandatory.

15. S. Doc. No. 248, at 230 (statement by Attorney-General Tom C. Clark); *id.* at 369 (statement by Congressman F. Walters, Chairman, Subcommittee on Administrative Law, Committee on the Judiciary, during House of Representatives proceedings prior to enactment of the APA).

16. See Brown, *The "Federal Administrative Procedure Act,"* 1947 WIS. L. REV. 66, 83; Netterville, *The Administrative Procedure Act: A Study in Interpretation*, 20 GEO. WASH. L. REV. 1, 30 (1951); Reich, *The Federal Administrative Procedure Act*, 8 FED. B.J. 7, 20 (1946); Comment, *Judicial Review Under the A.P.A.—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME LAW. 501, 524 (1948). But see Dickinson 577.

17. S. Doc. No. 248, at 369.

18. The legislative history of the APA is primarily comprised of the two committee reports and the hearings held by the House Committee on the Judiciary in 1945. That material plus the relevant portions of the proceedings of both chambers as reported in the *Congressional Record* are gathered in Senate Document Number 248 of the second session of the Seventy-Ninth Congress. See also *Hearings Before a Subcommittee on the Judiciary on S. 674, S. 675, and S. 918*, 77th Cong., 1st Sess., pts. 1, 2, and 3 (1941); ATTORNEY GENERAL'S MANUAL, *supra* note 13.

19. An amendment to S. 7 (APA), offered by the House Committee on the Judiciary and retained in the final version, added the clause "and provides that the action meanwhile shall be inoperative." S. Doc. No. 248, at 289. The footnote to the amendment clearly shows the meaning attached by the committee to be the plain meaning of the added words. See *id.* at 289 n.21.

congressional reports explicitly describe the desired operation of the provision²⁰ as well as the motivation for enactment: "There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective."²¹

Having determined that the intent of Congress was congruent with the language used in section 10(c),²² the Ninth Circuit had merely to determine which of the agency actions came within the meaning of the statute. The first two adverse decisions, rendered after adjudicatory hearings,²³ were unsuccessfully appealed by CMS to the Director of the Bureau of Land Management; however, CMS failed to appeal the Director's decision to the Secretary of the Interior.²⁴ Since the applicable agency statute did not require exhaustion, nor did the agency rules either require appeal²⁵ to the Secretary, or make the initial decision inoperative,²⁶ the court held that section 10(c) relieved CMS of the obligation to exhaust its administrative remedies. The Ninth Circuit's major holding, then, found that these two agency decisions were judicially reviewable.

The court's ruling on the third decision, however, limited its ear-

20. *Id.* at 213 (Senate report); *id.* at 277 (House report).

21. *Id.*

22. The court made no attempt to reconcile the apparent contradiction between the prefatory comments noted, see note 17 *supra*, and the explanatory statements, see note 21 *supra* and accompanying text. A possible explanation is that prior to the passage of the APA, the existing agencies ordinarily lacked the authority to make binding determinations at a level below that of the agency board or commission, so that section 10(c) would be expected to affect the exhaustion doctrine in only a very limited number of instances. Section 8 of the APA, which grants authority to subordinate hearing officers to make final decisions, was only briefly discussed in relation to this provision of section 10(c). See S. Doc. No. 248, at 289 n.21. Agency regulations promulgated since 1946 reflect section 8's grant of authority, but do not always attempt to avoid the operation of section 10(c) regarding appeals to superior agency authority. Compare, e.g., 43 C.F.R. §§ 221.40, .51 (1939) (General Land Office) and 46 C.F.R. § 201.17(a-b) (1939) (Maritime Commission) with 43 C.F.R. § 1852.3-8(b-c) (1970) (Bureau of Land Management) (§ 10(c) applicable) and 46 C.F.R. § 502.223 (1970) (Maritime Administration) (§ 10(c) not applicable).

23. ____ F.2d at ____ The hearings are known as "contest proceedings." See 43 C.F.R. § 221.67 (1962) (superseded).

The decisions under review were decided during the period of 1958-61, ____ F.2d at ____; consequently, citations to pertinent agency regulations will be to the next following codification, 43 C.F.R. (1962). The rules of practice found in the 1962 version were generally promulgated in 1956, 21 Fed. Reg. 1860 *et seq.* (1956), and were in force throughout the period in question.

24. ____ F.2d at ____

25. See 43 C.F.R. § 221.31 (1962), 21 Fed. Reg. 1861-62 (1956).

26. See *id.* § 221.1, 21 Fed. Reg. at 1860.

lier application of section 10(c) by indicating its belief that the provision did not affect what it termed a "corollary" of the exhaustion doctrine²⁷—issues not presented initially for agency determination are deemed to have been waived, and will not be heard by a court reviewing the administrative action.²⁸ Because this third decision was made unilaterally by the agency on the basis of documents on file,²⁹ with no advance notice to CMS that there was any dispute, CMS did not have an opportunity to raise the adjudicatory hearing issue at the original proceeding. Even in its unsuccessful appeal to the Director of the Bureau, CMS failed to raise the issue. The propriety of the Bureau's action in not holding such hearings³⁰ was raised *sua sponte* by the district court.³¹ Both the district and circuit courts held that, under the corollary to the exhaustion doctrine, CMS had thus waived the right to have that issue judicially reviewed. CMS was entitled to judicial review of other issues which had first been presented to the agency, but it could not raise the "waived" issue, which might have controlled the final result.

Although the fourth decision was also decided unilaterally by the agency, with no advance notice to CMS,³² due to the dissimilarity of subsequent events the lower court felt it necessary to accord this decision a different treatment and result. Unlike its response to the third decision, CMS declined to take an administrative appeal from

27. See ____ F.2d at ____

28. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964); *Adams v. Witmer*, 271 F.2d 29, 36-37 (9th Cir. 1959). See 3 DAVIS § 20.06, at 91-97; JAFFE 454-58.

29. ____ F.2d at ____

30. The lower court felt that a factual issue was in dispute, therefore an adjudicatory hearing might be required. *Id.* at ____

31. *Id.* at ____ Neither the district nor the circuit court opinions discussed the question of the propriety of a court considering such an issue *sua sponte*. *Cf. FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955).

32. CMS was not given advance notice of the agency action; however, the notice of decision did state that the action would be inoperative for 30 days from receipt to allow CMS to take an appeal to the Director of the Bureau. ____ F.2d at ____ In reversing the district court, the court of appeals appeared to base its opinion solely on the failure of CMS to appeal to higher agency authority although expressly noting that the decision was inoperative; yet, that court made no direct connection between the inoperative nature of the action and its holding. See ____ F.2d at ____ It would appear possible, if faced with a situation similar but for an *operative* unilateral decision, that the court could easily distinguish its present holding in order to allow immediate review based on section 10(c).

the fourth decision.³³ The district court found that, since CMS was given no advance notice of the agency action, it was procedurally unable to make a timely objection to the lack of adjudicatory hearings. Under such circumstances, reasoned the district court, waiver could not be imputed to CMS, and failure to exhaust remedies would thus not bar judicial review.³⁴ Reviewing the issue on the merits, the lower court held that denial of adjudicatory hearings was improper and a sufficient ground to overturn the agency's decision. The court of appeals, however, was concerned that such a resolution of the third and fourth decisions would create an anomaly—a party voluntarily taking an intra-agency appeal but failing to raise a crucial issue would lose his right to judicial review on that issue, while a party declining to take the available appeal would retain his right to review of the same issue.³⁵ The court of appeals therefore opted for a position favoring the exhaustion doctrine and reversed the district court's ruling on the last decision, holding that even if the party is denied the opportunity to raise a particular issue because of the unilateral nature of the original decision, any issues not considered in the unilateral proceed-

33. It is not altogether clear, however, that the agency decisions were operative—one of the two conditions necessary to bring section 10(c) into operation. The agency rules effective during the period of the agency decisions allowed the Director of the Bureau of Land Management to designate individual cases in which the examiner would make only a recommended decision to the Director, 43 C.F.R. § 221.76(c) (1962), 21 Fed. Reg. 7623 (1956); however, these proceedings were not so designated. ____ F.2d at ____ See note 25 *supra*. The court apparently did not consider 43 C.F.R. § 221.101 (1962), 21 Fed. Reg. 1865 (1956), which provided that "[n]ormally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal" But for the ambiguity supplied by the word "normally," this provision seemed to permit the application of the exhaustion doctrine since it made the initial decision inoperative. However, the rules nowhere provided that an appeal *had* to be taken. *Cf.* 43 C.F.R. §§ 221.1, 221.31 (1962), 21 Fed. Reg. 1860-61 (1956). While the opinion was unclear as to whether all four of the agency decisions were immediately operative, one decision was noted as expressly stating that it would become final within 30 days from its receipt unless an appeal was taken. ____ F.2d at ____ See note 32 *supra*. It should be noted that the language of section 10(c) is ambiguous as to whether an action must be made inoperative by rule or at agency discretion. The legislative history is also unhelpful; however, the "inoperative" clause was inserted as an addition to the pre-existing phrase "unless the agency otherwise requires by rule." Whether the drafters intended to make the additional precondition one effective only by rule is unclear. A rule would appear to be an extremely inflexible mechanism when dealing with individual decisions; therefore, Congress may well have intended to make this provision one to be applied at the agency's discretion. *Cf.* Note, *Direct Judicial Review of Administrative Action Under Section 10(c) of the Administrative Procedure Act*, 62 HARV. L. REV. 1216, 1220-22 (1949).

34. ____ F.2d at ____

35. See text following note 31 *supra*.

ing must first be raised in an administrative appeal before judicial review of those issues.

The circuit court's resolution of the fourth decision is inconsistent with the purpose of section 10(c). First, in the circumstance of a unilateral agency initial decision, the court's reasoning would reproduce the inequitable situation which Congress intended to remedy—a party would be compelled to take an administrative appeal while bearing the effect of an operative decision.³⁶ Section 10(c) embodies a legislative value judgment that imposition of an operative agency action requires the immediate availability of judicial review.³⁷ Second, the application of the "corollary" rule has been traditionally couched in terms of an imputed "waiver"; it is patently unreasonable to impute a waiver to a party who has failed to raise an issue solely for reasons under the control of his adversary. In the instant case it was because of the agency's failure to give notice of the pending decision that CMS was prevented from seeking an adjudicative hearing.³⁸ Furthermore, to find a waiver in this fourth ruling misconstrues the purpose underlying the "corollary" rule—fairness to the party-opponent,³⁹ whether that party is a private party or the agency itself.⁴⁰ Conversely, if a party chooses to take an administrative appeal despite a presently operative decision, as CMS did from the third decision, it is not unreasonable to shift the burden to that party to take full advantage of the opportunity by raising all relevant issues.

In its major holding, the *Consolidated Mines* court has finally brought judicial application of the doctrine of exhaustion of remedies

36. See S. Doc. No. 248, at 213 (Senate report); *id.* at 277 (House report).

37. *Id.*

38. See text accompanying note 32 *supra*.

39. It is considered unfair to allow a party to present an issue for the first time during judicial review of an administrative action because the opposing party thereby loses the opportunity to argue and present evidence concerning the issue before the agency. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); see JAFFE 455. See generally *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225 (1927); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1072-73 (5th Cir. 1969); *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961). A second important consideration, although more properly related to administrative efficiency than fairness, is that of allowing the agency to make the initial ruling upon the evidence and issue. See *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946); 3 DAVIS § 20.06, at 92; *cf.* *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

40. "Simple fairness to those who are engaged in the tasks of administration, and to litigants" justified the rule requiring exhaustion. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

into conformity with the mandate of section 10(c).⁴¹ However, by refusing to hear the claim of denial of hearing in the fourth decision, the court has left a small opening through which congressional intent—that operative decisions afford immediate review—may be thwarted. Section 10(c) does not, of course, present a serious impediment to the administrative process; the government conceded in *Consolidated Mines* that it “could ‘live with’ the decision.”⁴² This interpretation of section 10(c) will have no effect on the many agencies which already have either an enabling statute requiring exhaustion,⁴³ or rules of practice which make all initial decisions inoperative.⁴⁴ Either the operative statute or the rules of practice of the remaining agencies upon whom section 10(c) is effective must be altered,⁴⁵ or the agencies will face the prospect of judicial review at an early stage of administrative proceedings. Regardless of the actual number of agencies affected, the holding of *Consolidated Mines* can be viewed as a progressive step in accomplishing the primary goal of the APA—the simplification and standardization of federal administrative procedure.⁴⁶ The rule requiring exhaustion, and the inequities which would be produced by its inflexible application, have forced the courts to develop a vast array of exceptions.⁴⁷ The confusion generated by the

41. In two prior cases dealing with the Bureau of Land Management, the Court of Appeals for the Ninth Circuit applied the doctrine of exhaustion of remedies to sustain agency action under similar circumstances. *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *Mulkern v. Hammitt*, 326 F.2d 896 (9th Cir. 1964). The court decided that the holding in the present case would not require an en banc hearing which is normally required to overrule an earlier case, because section 10(c) was not considered in either the *Davis* or *Mulkern* opinion. ____ F.2d at ____ *But cf.* *Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719 (9th Cir.), *cert. denied*, 368 U.S. 889 (1961); *Consolidated Flower Shipments, Inc. v. CAB*, 205 F.2d 449 (9th Cir. 1953) (in both cases the court considered section 10(c) in regard to questions relating to applications for rehearing and finality for purposes of judicial review, but did not consider the question of administrative appeals).

42. ____ F.2d at ____

43. *See, e.g.*, 7 U.S.C. § 608c(15)(A)(1970) (Sec’y of Agric.); 15 U.S.C. § 717r(a) (1970) (FPC); 15 U.S.C. § 852l(a, c) (1970) (FPC); 19 U.S.C. § 1514(a) (1970) (Bureau of Customs).

44. *See, e.g.*, 14 C.F.R. § 302.27(c) (1971) (CAB); 49 C.F.R. § 1100.97(a) (1971) (ICC).

45. The least disruptive alternative would seem to be that found in the rules of several agencies, whereby an initial decision is automatically stayed pending expiration of the period allowed for appeal. *See* note 44 *supra* and accompanying text. A procedure of this type has been imposed on the FTC by statute. 15 U.S.C. § 45(g)(1) (1970). The report of the House Judiciary Committee on the APA lends support for a rule of this nature. S. Doc. No. 248, at 289 n.21.

46. *See* note 7 *supra* and accompanying text.

47. *See, e.g.*, *Levers v. Anderson*, 326 U.S. 219 (1945) and *United States v. Abilene & So. Ry.*, 265 U.S. 274 (1924) (futility of exhaustion); *CBS v. United States*, 316 U.S. 407 (1942)

application of these exceptions⁴⁸ has led a leading expert in the field to say that "[t]he law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not."⁴⁹ Widespread judicial awareness of section 10(c) can simplify and standardize application of the doctrine by limiting its use to situations where a statute expressly demands exhaustion, or alternatively, where an agency both requires exhaustion and makes its action inoperative pending appeal.

IX. JUDICIAL REVIEW—PRIMARY JURISDICTION

ANTITRUST VIOLATIONS AND THE COMMODITIES EXCHANGE COMMISSION

In *Silver v. New York Stock Exchange*¹ the Supreme Court held for the first time that the securities industry is not exempt from the federal antitrust laws,² and promulgated the "necessary to make the Act work"³ test to reconcile the Securities Exchange Act with the Clayton and Sherman Acts. The *Silver* opinion, however, left unresolved⁴ the important and complex question of primary jurisdiction⁵

and *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), *cert denied sub nom.* *Federal Maritime Bd. v. United States*, 347 U.S. 990 (1954) (irreparable injury threatened); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919) (jurisdictional challenge allowed). See also 3 DAVIS § 20.01, at 56.

48. *E.g.*, 3 DAVIS § 20.02, at 60, 66-67.

49. *Id.* § 20.01, at 56.

1. 373 U.S. 341 (1963).

2. The Clayton Act, 15 U.S.C. §§ 12-27 (1970), and the Sherman Act, *id.* §§ 1-7.

3. 373 U.S. at 357; see notes 28-30 *infra* and accompanying text.

4. The *Silver* Court stated:

Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today. 373 U.S. at 358 n.12.

Ordinarily the question of primary jurisdiction arises where a claim is brought before a court and it is asserted that the court's jurisdiction to decide a pertinent issue has been superseded by an agency's authority. JAFFE 121-22. Since the Supreme Court in *Silver* concluded that the SEC had no power to consider the plaintiff's complaint, jurisdiction vested only in the court. The